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Federal Communications Commission
Washington, D.C. 20554

98-184

June 12, 2002

Mr. Jeffrey Ward
Senior Vice President – Regulatory Compliance
Verizon
1310 North Courthouse Rd. – 4th floor
Arlington, VA 22201

Dear Mr. Ward:

This letter responds to concerns Verizon Communications, Inc. ("Verizon") raised to the Investigations and Hearings Division ("Division") staff on June 4, 2002 regarding the Division's May 29, 2002 letter order to Verizon.¹ In that letter, the Division issued rulings concerning audit requirements that the Commission established in the *Bell Atlantic/GTE Merger Conditions*.² In this supplemental letter, we make certain clarifications and modifications as set forth below to the *Division May 29th Letter*.

1. Accuracy and Completeness

In the *Division May 29th Letter*, we stated that the *Bell Atlantic/GTE Merger Conditions*' "accuracy and completeness" requirement obligates Verizon's general compliance auditor³ to assess Verizon's entire performance measurements collection and reporting process.⁴ We noted that the audit as currently structured would not result in an audit report that would satisfy the accuracy and completeness requirement.

Verizon has raised three concerns. According to Verizon: (1) Verizon and the Common Carrier Bureau (now the Wireline Competition Bureau) previously agreed that the audit as currently structured satisfies the "accuracy and completeness" requirement; (2) the audit work

¹ See Letter from Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, to Jeffrey Ward, Senior Vice President, Regulatory Compliance, Verizon (May 29, 2002) ("*Division May 29th Letter*"). Rather than file a formal motion for reconsideration or application for review, Verizon informally requested that we consider their concerns. Accordingly, we provide this supplemental letter memorializing the conclusions we reach after considering Verizon's concerns.

² *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*" or "*Bell Atlantic/GTE Merger Conditions*").

³ By "general merger conditions auditor," we mean the independent auditor performing the audit required by paragraph 56 of Appendix D of the *Bell Atlantic/GTE Merger Order*. This audit covers Verizon's compliance with all the merger conditions except Condition I, Advanced Services Affiliate, and the Genuity conditions.

⁴ *Division May 29th Letter* at 2; *Bell Atlantic/GTE Merger Order* at Appendix D, ¶ 56(f).

required by the *Division May 29th Letter* is unduly burdensome and costly and is unnecessary; and (3) the audit work required by the *Division May 29th Letter* will jeopardize the calendar year 2002 audit.

We reaffirm the decision in our *Division May 29th Letter*. As an initial matter, the Wireline Competition Bureau has indicated that there was no final resolution concerning the scope of the audit on this point prior to the transfer of audit responsibility to the Enforcement Bureau. Verizon's erroneous belief that there had been final resolution of this issue with the Wireline Competition Bureau is not determinative here because, as we stated in the *Division May 29th Letter*, the audit must include an examination of Verizon's entire performance measurements collection and reporting process in order to satisfy the "accuracy and completeness" requirement. We are simply not persuaded that Verizon's cost concerns should drive our decision on this matter. The *Merger Conditions* require an audit of accuracy and completeness, and the cost Verizon incurs to obtain a sufficient audit is a necessary cost of compliance. In addition, although Verizon suggests that the audit need not test its automated systems, we disagree. Despite Verizon's explanations about why there is no reason to suspect improper functioning of the automated systems, we cannot presume that the systems function properly absent an audit.⁵ Finally, the additional audit work should not jeopardize timely completion of the next audit. The remedial audit work should be completed by October 1, 2002, leaving sufficient time for the independent auditor to perform audit testing for the 2002 audit.

2. State Performance Measurements for UNE/Line Sharing Audit

In the *Division May 29th Letter*, we noted that the *Merger Order* requires an audit that assesses Verizon's compliance with the Commission's UNE and line sharing requirements.⁶ We rejected the independent auditor's view that an examination of state performance measurement data for this purpose would be outside the scope of the audit for certain Verizon states because the *Merger Conditions'* Carrier-to-Carrier Performance Plan was no longer applicable to those states.⁷ We found that, to comply with the audit requirement, Verizon's audit report would have to reflect an assessment of compliance in all states in which Verizon provides service.

Verizon has expressed concern on a slightly different, but integrally related, issue. It notes that the independent auditor must decide for itself what information is relevant to this assessment and that the Commission may not properly direct the auditor to examine specific data, in this case, performance measurement data that Verizon reported to the states. We agree with Verizon that it would be inappropriate for the Division to mandate precisely what data the

⁵ Indeed, Verizon itself has reported to the Commission errors in performance measures reports that were the result of problems with automated systems. See, e.g., Letter from Dee May, Verizon to Mark Stone, Federal Communications Commission (February 28, 2002) (identifying errors in performance measures reports for retail provisioning that resulted from improper functioning of automated systems).

⁶ *Division May 29th Letter* at 3.

⁷ *Id.* at 2-3.

independent auditor must review to perform the requisite assessment. Indeed, the *Division May 29th Letter* does not direct the independent auditor to base its opinion on state performance data,⁸ and we recognize here that the independent auditor must itself determine whether an evaluation of that data is necessary. As a practical matter, however, it is not clear to us what alternative performance data the independent auditor might use to assess Verizon's compliance with the Commission's UNE and line sharing requirements. As we mentioned in the *Division May 29th Letter*, the Commission has stated many times that state performance data is the best evidence of compliance with these rules.⁹ Therefore, although we defer to the independent auditor in its determination of what data it will review to render the necessary opinions, we note that we expect the auditor to make that determination taking into account the ruling we reiterate above. *i.e.*, that a review of state performance measures data is well within the scope of the audit.

3. Genuity Performance Data

In the *Division May 29th Letter*, we reiterated the *Merger Conditions* requirement that Verizon's independent auditor assess and opine on whether Verizon provided special access services to Genuity in a non-discriminatory manner during the audit period.¹⁰ To that end, we directed Verizon to respond fully to the independent auditor's request for Verizon's special access performance data on a service-level basis (*i.e.*, DS-0, DS-1, DS-3, and Oc-n), within 20 days of the *Division May 29th Letter*.¹¹

Verizon argues that: (1) Verizon has no obligation under the *Merger Conditions* to respond to the auditor's data request; (2) AICPA standards prohibit the independent auditor from opining on discrimination in this circumstance; and (3) in any case, the letter does not give Verizon enough time to gather and provide the outstanding data to the independent auditor.

First, we reiterate the conclusion in our *Division May 29th Letter* that the requested data is within the scope of the audit, and that Verizon must provide the data to the auditor. The *Merger Order* requires that Verizon provide an audit report that tests for special access discrimination.¹² Section 202(a) of the Act provides the framework for the discrimination analysis, and it requires a comparison of like-to-like services.¹³ Therefore, the auditor's request for performance data by service-level is necessary to assess discrimination and is well within the scope of the audit.

⁸ See *id.* (The independent auditor's "evaluation *may* be based on performance data Verizon reported to state commissions during the engagement period.") (emphasis added) (citation omitted).

⁹ *Id.* at 3.

¹⁰ *Division May 29th Letter* at 3-5.

¹¹ *Id.* at 4.

¹² See *id.* at nn. 13 & 14 (citing *Bell Atlantic/GTE Merger Order* at ¶¶ 5, 71-72 (stating that discrimination in the provision of special access services should be readily detectable by the independent auditor), 74, 339, n.791).

¹³ 47 U.S.C. § 202(a); see also *Total Telecommunications Services, Inc. v. Atlas Telephone Company*, Memorandum Opinion and Order, 16 FCC Rcd 5726 at ¶ 33 (2001); *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (describing the Commission's three-step inquiry for evaluating discrimination under 47 U.S.C. § 202(a)); *In the*

We disagree with Verizon's suggestion that paragraphs 53 and 56(c) of the *Merger Conditions* limit the scope of the audit to only the aggregated data Verizon provides to the Commission. Paragraph 53 requires Verizon to submit special access performance data in two broad categories of "regular special access" and "high speed special access."¹⁴ Paragraph 53 does not, either on its face or implicitly, limit the scope of the auditor's inquiry to aggregated data reflecting performance in these two broad categories. Verizon's approach reads the auditor's duty to test for discrimination out of the *Merger Conditions* by limiting the audit to what Verizon has already submitted to the Commission, *i.e.*, broad categories of data that do not permit the service-by-service evaluation required by section 202(a).

Paragraph 56(c) requires Verizon to make available to the independent auditor its books, records, and papers. What the independent auditor seeks here, *i.e.*, the performance data on a disaggregated basis (the raw performance data), is contained in Verizon's records. That Verizon may have to produce the records in the format requested by the independent auditor does not remove it from the realm of Verizon's books, records, and papers. Indeed, independent auditors routinely request information from the auditee in a format that may be different from that in which the auditee may normally keep its records. To the extent Verizon represents to the Division that the raw data at issue is simply nonexistent, we will be obliged to defer to that representation. However, the company will need to provide to us specific and detailed information identifying precisely which categories of data do not exist.¹⁵

Second, we modify the *Division May 29th Letter*'s requirement that the independent auditor perform the third prong of the section 202(a) analysis, *i.e.*, a determination whether any special access discrimination is unjust or unreasonable. Paragraph 72 of the *Merger Order* requires that the auditor only detect any special access "discrimination."¹⁶ In other words, in contrast to section 202(a)'s third prong, which requires a determination of whether discrimination is "unjust or unreasonable," paragraph 72 requires only that the auditor determine whether Verizon's special access service quality to Genuity was better than that for non-Genuity unaffiliated carriers during the audit period. As a result, we require only that the independent auditor perform the first two prongs of the section 202(a) test, *i.e.*, that it compare service quality for like services (DS-0, DS-1, DS-3, and Oc-n) and determine whether Genuity received better service than other unaffiliated carriers. We expect the independent auditor to perform this analysis for each state and month.

Matter of Performance Measurements and Standards for Interstate Special Access Services, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 at ¶¶ 8-9.

¹⁴ *Bell Atlantic/GTE Merger Order* at Appendix D, ¶ 53.

¹⁵ The affidavit Verizon submitted on May 2, 2002 is unclear on this point because it did not identify specific categories of data and merely states that the "reports" the auditor requested do not currently exist. The affidavit did not mention the status of the underlying raw performance data. *Affidavit of Linda D. Thoms* at 1-2, ¶ 2.

¹⁶ *Bell Atlantic/GTE Merger Order* at ¶ 72.


Finally, Verizon states that it will not be able to satisfy the independent auditor's data request within the 20-day period required by the *Division May 29th Letter*. In light of Verizon's concern, we require Verizon, by June 18, 2002 (*i.e.*, the original due date), (1) to provide to the independent auditor all responsive data it has compiled by that date, and (2) to propose in writing to the Division a timetable for providing the rest of the data to the auditor. If Verizon determines that, for any category of data, it does not possess the underlying raw data, it should notify the Division immediately.

If Verizon disagrees with any of the above, it may file a petition for reconsideration pursuant to section 1.106 or an application for review pursuant to section 1.115 of the Commission's rules.¹⁷

If you have any questions concerning the issues raised in this letter, please contact me. You may also contact Mark Stone of my staff at (202) 418-0816.

Thank you for your cooperation.

Sincerely,



Maureen F. Del Duca
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau

CC: John Horan, PricewaterhouseCoopers, LLP
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¹⁷ 47 C.F.R. § 1.106 and 1.115.